

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CINDY ROBERTS)	
Claimant)	
VS.)	
)	
SCRAPBOOK GARDEN, INC.)	Docket No. 1,010,664
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE)	
CO./AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and one of its insurance carriers Continental Western Insurance Company appeal the October 2, 2003 preliminary hearing Order of Administrative Law Judge Jon L. Frobish. Claimant was awarded temporary total disability benefits beginning August 12, 2003, and continuing until released to substantial gainful employment.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment with respondent on March 21, 2003?
- (2) Does the Appeals Board (Board) have jurisdiction to consider the issue involving claimant's entitlement to temporary total disability in this appeal?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds that this appeal should be dismissed.

While moving books at work, claimant suffered accidental injury to her right shoulder on August 10, 2002. She was referred for treatment with John P. Estivo, D.O., who

referred her to physical therapy. Claimant continued working for respondent while under Dr. Estivo's care.

Claimant testified that she suffered an aggravation of her condition on March 21, 2003, while lifting boxes for respondent. As of this date, respondent had changed insurance carriers from American Insurance Company (American), aka Fireman's Fund Insurance Company, to Continental Western Insurance Company (Continental). Claimant was again referred to Dr. Estivo for treatment and continued under his care until May 23, 2003, at which time she terminated her employment with respondent as she and her husband were relocating to Colorado.

At the preliminary hearing, claimant's attorney announced that they were seeking temporary total disability compensation, as claimant had already been provided medical treatment with a doctor in Colorado. Claimant underwent surgery to her right shoulder on August 20, 2003.

Respondent and one of its insurance carriers, Continental, alleges that claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment on March 21, 2003. However, in its brief, respondent does not argue that the incident on March 21, 2003, did not occur, but rather that the medical evidence only supports a finding that claimant's increased pain on that date was merely a temporary aggravation of her original August 10, 2002 injury. Additionally, as claimant is the only person to testify in this matter, her description of the accident on March 21, 2003, is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.¹ The Board finds that the issue raised by respondent is not whether claimant suffered accidental injury arising out of and in the course of her employment on March 21, 2003, but rather the extent of that injury as it impacts the original August 10, 2002 accident and, ultimately, which insurance company is liable for the benefits ordered.

The Board has ruled on many occasions that disputes between insurance carriers concerning which of them is to pay the cost of ordered preliminary hearing benefits are not jurisdictional issues.² The Board acknowledges that an issue concerning which of two respondents is liable for benefits is jurisdictional.³ Here, however, as the dispute is between two insurance carriers, the Board's prior rulings control. Therefore, the Board

¹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

² *Ireland v. Ireland Court Reporting*, Nos. 176,441 & 234,974, 1999 WL 123220 (Kan. WCAB Feb. 22, 1999); *Linville v. Grandview Products Co., Inc.*, No. 230,739, 1998 WL 381565 (Kan. WCAB June 16, 1998).

³ *Goitia v. Southwest Developmental Services, Inc., & Bethphage/Advent Services, Inc.*, Nos. 233,983 & 245,196, 2000 WL 137183 (Kan. WCAB Jan. 6, 2000).

does not take jurisdiction over this dispute and the appeal of respondent and its insurance carrier Continental from the preliminary hearing Order should be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated October 2, 2003, remains in full force and effect, and the appeal of respondent and its insurance carrier Continental Western Insurance Company should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
James B. Biggs, Attorney for Respondent and Insurance Carrier (Continental)
Terry J. Torline, Attorney for Respondent and Insurance Carrier (American)
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Director